UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1997/4/Add.2
26 November 1996

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Fifty-third session
Item 8 of the provisional agenda

# QUESTION OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

## Report of the Working Group on Arbitrary Detention

## Addendum

## Visit to Nepal

CONTENTS


| | | Paragraphs | Page |
|---|---|---|---|
| Introduction | | 1 - 8 | 2 |
| I. | OBSERVATIONS BY THE GROUP ON THE CONDUCT OF CRIMINAL PROCEDURE: RULES APPLICABLE UNDER CURRENT LEGISLATION | 9 - 21 | 3 |
| II. | PROGRESS TO BE MADE AND GAPS NOTED IN THE IMPLEMENTATION OF LEGISLATION | 22 - 33 | 5 |
| III. | CONCLUSIONS | 34 | 7 |
| IV. | RECOMMENDATIONS | 35 - 36 | 7 |

Introduction

1. The Working Group on Arbitrary Detention, represented by its Chairman, Mr. L. Joinet, accompanied by the Group's secretary, visited Nepal at the invitation of that country's Government from 22 to 29 April 1996. It should be pointed out that, when the Working Group informed the Nepalese Chargé d'affaires in Geneva of its wish to travel to Nepal, its intention had been solely to visit the Bhutanese refugee camps in eastern Nepal in order to gain a better understanding, in the context of the follow-up visit to Bhutan which had been agreed with the Thimphu authorities, of the human rights implications of the situation there. In response, the Nepalese authorities had indicated that the Working Group would be free to visit the refugee camps, provided that the Government was not involved in any way in preparing or conducting such a visit, and furthermore proposed that the Working Group should at the same time visit the country within the framework of its mandate.

2. During its stay in Nepal, the Working Group met the Director General of the Prison Administration Department (Ministry of the Interior), the Assistant Inspector General of Police and the Attorney General (legal adviser to the Government), as well as the directors of the various prisons and places of detention visited. The Working Group also met the chief district officers of Morang and Jhapa, as well as judges of the district courts of Morang (in Biratnagar) and Gorkha.

3. In addition, the Working Group had fruitful meetings with members of the human rights committee of the Bar Association, convened by its chairman, and later with the President of the National Bar Association and with lawyers attached to the Supreme Court.

4. In Kathmandu, the Working Group visited the central prison (800 prisoners), the Bhadra Gol prison (400 prisoners) and the Dilli Bazar prison (162 prisoners), as well as the detention facilities of the "Hanouman Dhoka" police station. The Group also travelled to Gorkha, where it visited the local prison. At all those prisons, as well as in the police stations of the capital and provinces, the Group enjoyed great freedom of action: complete freedom of movement and freedom to choose which detainees to interview and where, the interviews being conducted solely in the presence of the delegation.

5. Regarding non-governmental contacts, the Working Group had meetings with numerous representatives of non-governmental organizations.

6. The Working Group also held two meetings with senior staff of the United Nations Development Programme (UNDP) and of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Kathmandu.

7. UNDP and the United Nations Information Centre provided the Working Group during its stay and travels with valuable assistance (logistics, interpretation, contacts), which greatly facilitated the mission.

8. Regrettably, however, the visit which the delegation had been due to make to places of detention in the Rolpa region (province situated in western Nepal), where a state of emergency has been in force since the establishment of a guerrilla base in the area, had to be cancelled because no flights were available owing to bad weather.

## I. OBSERVATIONS BY THE GROUP ON THE CONDUCT OF CRIMINAL PROCEDURE: RULES APPLICABLE UNDER CURRENT LEGISLATION

9. When the police receive a petition or a complaint from a victim, or when an offence has just been committed, they record the case, institute an inquiry and carry out initial investigations to identify the person who committed the offence. If the offender is identified, the police have direct authority to issue an arrest warrant. Upon arrest, the person is placed in custody in police premises for a maximum period of 24 hours. Travelling time (sometimes as long as two or three days, owing to the Himalayan terrain) is not included in this period. The presence of counsel during custody is legally possible but not compulsory (and therefore infrequent). An indigent defendant is in principle entitled to assistance from assigned counsel. However, lawyers can intervene only after the case has been registered at the court office, and this excludes them de facto for the first 24 hours of custody.

10. With regard to aliens, there is provision for the assistance of an interpreter, who in most cases is supplied by the consulate.

11. It should be noted that arrests may be carried out by day or at night, with only a police warrant, except in the case of a house search, where the investigator must present a judicial warrant.

12. If more time appears necessary for the purposes of the investigation, the investigator must obtain authorization from the court. The application for an extension, which may not exceed 25 days in all, is submitted to the judge in the presence of the person being held in custody. In the event of grave disturbances of public order (attempt on the life of members of the royal family, terrorism, armed clashes, etc.), an extension may be granted by the chief district officer for a total of three months under the Public Offence Act.

13. For minor offences (public drunkenness), on the other hand, the extension may be decided by the police themselves, in which case it may not exceed a second period of 24 hours.

14. From the legal standpoint, the period of extension for a maximum of 25 days, being authorized under the supervision of a court, can be assimilated to detention pending indictment, whereas the three-month extension provided for by the Public Offence Act presents the characteristics of administrative detention, since it is ordered under the sole authority of the chief district officer.

15. When the police consider that the liability of the probable offender has been sufficiently established, the person is brought before the public prosecutor for his statement to be taken. After asking whatever questions may

be necessary, the prosecutor reads out the statement and then has it signed by the person subject to prosecution. The statement must be signed in the presence of the prosecutor.

16. The prosecutor may defer this formality and ask the police to carry out further inquiries.

17. If the period of 25 days has expired and the investigation must proceed, the public prosecutor prepares a motivated request for the extension of detention on the basis of the accusation maintained at that stage of the investigation. Once the investigation has been completed, the police make a final report and recommend to the prosecutor either that the person should be released, because of his innocence or for lack of sufficient evidence, or that he should be brought to court for trial.

18. The public prosecutor is not bound by the police recommendations when taking his decision. If he believes that there are sufficient grounds, he draws up a formal indictment and submits it to the court (or to the chief district officer, in exceptional cases, where that officer has power under the Public Offence Act). The public prosecutor (or the chief district officer, as appropriate) may decide either to remand the person in detention pending trial or to release him on bail until that date, provided that the penalty to which he is liable does not exceed three years; the amount of such bail must take account of the financial circumstances of the person concerned.

19. During the trial, the public prosecutor argues the case for the prosecution against the defence counsel. Under the rules of procedure, the party instituting the proceedings must have the final word, both in civil and in criminal cases. The public prosecutor is therefore the last to speak, unless he brings further charges or in the event of an appeal being lodged by the defendant. It should be pointed out that the assistance of counsel is not compulsory at any stage of the proceedings.

20. Both the defendant and the prosecutor may appeal, but only the defendant may appeal to the Supreme Court.

21. The Working Group wishes to emphasize therefore that, at both the constitutional and the legislative level, Nepal has gradually established a system governed by the rule of law which counts among the most advanced of the region: the former absolute monarchy has become a constitutional monarchy; at the political level, the multi-party system (art. 112 of the Constitution) and press pluralism are constitutionally protected; the right of association is recognized and non-governmental human rights organizations, even if they face some difficulties, enjoy a greater freedom to act and to report than in most neighbouring countries. While subject to the provisions of the national security law and the Public Offence Act, the rules of criminal procedure conform in the main to those set forth in the international human rights instruments. Lastly, the fact that by Act 2047 of 1990 Nepal has established the primacy of treaties over domestic laws and has ratified virtually all the main international human rights instruments is welcomed by the Working Group, which would like that to serve as an example to many other States in the region.

## II. PROGRESS TO BE MADE AND GAPS NOTED IN THE IMPLEMENTATION OF LEGISLATION

22. While welcoming this significant advance in terms of principles, the Working Group considers that a second stage should follow with all efforts being mobilized to make these principles truly effective, lest in practice the rule of due process should ultimately, de facto, become the exception. This is a real risk but the situation remains controllable by virtue of the emergence, in the country's recent history, of a human rights culture, as evidenced, for example, in the discussion generated by the proposed establishment of a national human rights commission.

23. The main difficulties to be overcome concern the following areas.

24. Arrests and custody. The statutory 24-hour period of custody is not sufficiently observed, and the same holds for the 25-day maximum period prescribed for the initial stage of pre-trial detention, which is applied in a very uneven manner from one court to another. On occasion, according to detained persons interviewed by the Working Group, such arrests are made with no warrant, not even from the police.

25. Free legal aid and assistance of an officially appointed lawyer. The free legal aid provided for by the Constitution (art. 26, para. 14) is very infrequently given, either because potential beneficiaries are ill-informed or (and more especially) because of lack of funds. Officially appointed lawyers receive little, if any, remuneration. While the presence of counsel during custody is possible, the Working Group observed that it is not compulsory and noted instances where detainees had not received assistance from counsel for almost a year after their arrest.

26. Ill-treatment during investigation. While the prisoners seen by the Working Group very rarely reported ill-treatment in prisons, the same cannot be said for police detention centres. In the light of its inquiries into this matter, the Working Group considers that such dysfunctions are due primarily to the greater weight attached to confessions in the scale of evidence. This is probably one of the main reasons for the quite frequent cases of ill-treatment inflicted during investigations and, consequently, a source of judicial error. The police and judicial services could be sensitized to this important issue on the basis of the fact that Nepal has not only ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (although without having incorporated the corresponding legislation into its domestic law), but has also just approved a bill on compensation for victims of such practices. This is welcomed by the Working Group, which accorded great importance to the bill in its interviews with the authorities.

27. Conditions of application of the Public Offence Act. While the Working Group noted statistics according to which no one had been detained under the law on national security, i.e. as a political prisoner, it nevertheless found that the Public Offence Act, which in theory deals only with ordinary offences, was being applied in respect of offences obviously coming under the national security law. This redefinition, which is hardly consistent with the principle of the legality of offences and penalties, enables the authorities responsible for law and order to present some prosecutions in the statistics

as cases involving merely common crimes when they may, in fact, be of a political nature. This manner of applying the Public Offence Act seems to have become widespread in recent months in the western Nepalese province of Rolpa, where the guerilla base mentioned above is located.

28. Habeas corpus and states of emergency. While the Working Group was pleased to note, as emphasized by the Human Rights Committee (CCPR/C/74/Add.2, para. 11), that under the Constitution of Nepal habeas corpus is not derogable under any circumstances, several sources indicated that it was very difficult in practice to secure the protection or release of a person by habeas corpus when the Public Offence Act was applied.

29. Military courts. Significant changes would have to be made in the functioning of the military courts to make them compatible with the rules concerning the right to a fair trial provided for in article 14 of the International Covenant on Civil and Political Rights. It is abnormal, in the Working Group's view, that these emergency courts should:

(a) Be composed only of military personnel;

(b) Be able to try civilians who have committed offences against military personnel, whereas their jurisdiction should be confined strictly to offences under the military regulations committed solely by members of the armed forces;

(c) Be able to try offences committed by military personnel when the victims are civilians;

(d) Allow only for the military police to conduct investigations; and, in particular,

(e) Conduct their proceedings in camera as a rule, when sitting as courts martial, an aggravating circumstance being that the presence of counsel is not even authorized in such cases.

30. Forensic investigations. The Working Group was concerned by the fact that investigators are more often than not unable to obtain forensic expertise, especially in the provinces, even though proof of guilt in some cases may depend on it. The Working Group observed, for example, that in the absence of such expertise, heavy sentences appear to have been pronounced for infanticide in cases probably, not to say obviously, involving abortion - which, although punishable by law, none the less carries much lighter penalties.

31. Overcrowding in prisons for procedural reasons. The Working Group also found that continued pre-trial detention beyond the statutory period, often for excessive periods of time, causes overcrowding in some prisons, under conditions that fall well short of the principles set forth in the Standard Minimum Rules for the Treatment of Prisoners. Other main causes of overcrowding are that a sentenced person unable to pay a fine may be kept in detention, and that no provision is made in the legislation for judges to impose suspended prison sentences.

32. Records in places of detention. Monitoring of the lawfulness of the detention of persons deprived of liberty would require improvement and, in particular, standardization of the presentation and keeping of records in places of detention. These records should include all procedures to which persons taken into custody are subject (detention and the reason for it, time of travel, transfer, first appearance before a judge, appearance before the court for trial, disciplinary measures, release, etc.). Such monitoring can furthermore be expected to help reduce prison overcrowding.

33. Legislation concerning aliens. Regarding the status of aliens, the Working Group noted that limitations appear to be placed by the Constitution on the safeguards of human rights, which seem in part not to apply to non-nationals.

## III. CONCLUSIONS

34. The Working Group's findings may be summarized as follows:

(a) The transition from an absolute and authoritarian monarchical system to a modern system of constitutional monarchy has been effected, enabling Nepal gradually to establish, at the normative level, a very advanced system based on the rule of law;

(b) While positive in terms of principles, the implementation of this legislation is problematic and slow, both because of the low standard of living of a large part of the population and because of the weight of previous practices and attitudes, which are slow to change in many areas concerned with law enforcement;

(c) It would seem that this handicap can gradually be overcome thanks to the dynamics of the new system governed by the rule of law and also to an emerging human rights culture, a factor which could be strengthened by intensifying the awareness of civil servants and officials responsible for law enforcement through human rights training, while at the same time showing a greater firmness towards State officials who infringe human rights in the performance of their duties, and making that approach known by example.

## IV. RECOMMENDATIONS

35. In the light of the above comments, the Working Group recommends that the following measures should be taken:

Measures to reduce overcrowding in prisons and to monitor the lawfulness of detention

(a) Programmes of awareness raising and training of judges to ensure that the 25-day maximum period for the initial stage of pre-trial detention is strictly observed;

(b) Keeping of standardized records of persons received into custody in all places of deprivation of liberty;

(c) Introduction of suspended sentences for minor offences which are currently punishable only by terms of imprisonment;

(d) Prescription by the legislation of an appropriate legal remedy enabling a detained person to appeal to a court or other independent authority;

(e) Effective application of the practice of release on bail (having due regard for the economic situation of the person concerned), even when the applicable penalty exceeds three years;

(f) Measures to sensitize judges to the need, when imposing fines, to take into account not only the seriousness of the offence but also the financial circumstances of the person concerned;

Measures concerning the right to a defence

(g) Creation of a committee with the task of studying the reasons for, and suggesting ways to remedy, the dysfunctions noted in the provision of free legal aid and the remuneration of officially appointed lawyers;

(h) Effective provision for counsel to be present from the very first hours of custody;

(i) Adaptation of the functioning of the military courts to the standards concerning the right to a fair trial, by reviewing their composition so that, as a minimum, they are presided over by a civil magistrate, as well as ensuring that investigations are conducted by the civil judicial police, that in camera hearings become the exception, that the presence of counsel is assured in all circumstances and that the courts' powers are strictly limited to trying offences under the military regulations committed by members of the armed forces;

Measures against ill-treatment and torture

(j) Adoption of domestic legislative measures to incorporate the provisions of the Convention against Torture, to which Nepal has acceded, into national law so that persons who engage in torture can be prosecuted (and appropriate penalties imposed on those found guilty);

Measures concerning emergency legislation

(k) Reform of the Public Offence Act in order to furnish jurisdictional guarantees for the current three-month prolongation of detention that may be decided at the sole initiative of the chief district officer, an arrangement which at present confers on this form of detention an arbitrary character by reason of its exclusively administrative nature;

Measures to promote human rights

(l) Incorporation in the bill on establishing an independent national human rights commission of the principles relating to the status of national institutions for the promotion and protection of human rights adopted by the General Assembly on 20 December 1993 in its resolution 48/134.

36. In the view of the Working Group, priority should be given to implementation of measures (a) to (d), (f), (g), (j), (k) and (l).